

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MELISSA J. EARLL,
Plaintiff,

v.

EBAY INC.,

Defendant.

Case No.: 5:11-CV-00262-EJD

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS SECOND
AMENDED COMPLAINT**

[Re: Docket No. 80]

Presently before the court is Defendant eBay Inc.'s ("Defendant") Motion to Dismiss and Strike Plaintiff Melissa J. Earl's ("Plaintiff") Second Amended Complaint ("SAC") pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(f). The court found this matter suitable for decision without oral argument pursuant to Civil Local Rule 7-1(b) and previously vacated the hearing. The court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331, and personal jurisdiction and venue are proper because Defendant is a corporation headquartered in Santa Clara County. Having fully reviewed the parties' briefing, the court GRANTS Defendant's Motion to Dismiss. Because the court grants dismissal with prejudice, Defendant's Motion to Strike is moot.

I. BACKGROUND

The background of this case was thoroughly presented in this court's Order granting Defendant's Motion to Dismiss First Amended Complaint, and is repeated only to the extent it is applicable to the present motion. See Dkt. No. 76. Plaintiff, a Missouri resident who is deaf, filed this putative class action on March 16, 2010 in the Western District of Missouri alleging violations of the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq. ("ADA") and the California Disabled Persons Act, Cal. Civ. Code §§ 54 et seq. ("DPA"). See Dkt. No. 1. Plaintiff based these claims on assertions that she, as a deaf individual, was unable to register as an eBay seller because Defendant failed to provide her with an accommodation to its telephonic identity verification policy.

The case was transferred to this district in January 2011 and assigned to Judge Jeremy Fogel. See Dkt. Nos. 30, 34. After transfer, Plaintiff moved for leave to file an amended complaint. Dkt. No. 47. The proposed amended complaint maintained Plaintiff's original claims and added a claim under the Unruh Civil Rights Act, Cal. Civ. Code §§ 51, et seq. ("Unruh Act"). Judge Fogel denied Plaintiff's motion for leave to amend without prejudice, finding that (1) the ADA could not afford a remedy to Plaintiff because eBay.com is not a place of public accommodation, but (2) Plaintiff may be able to state an independent claim under the Unruh Act if she sufficiently pleaded intentional discrimination, and (3) Plaintiff may be able to state independent claims under the DPA if she alleged a violation of a California law that requires higher standards of website accessibility than the ADA. Dkt. No. 61 at 3:18-5:22. Judge Fogel granted Plaintiff leave to file an amended complaint consistent with his Order. Id.

This case was transferred from Judge Fogel to this court on September 27, 2011. See Dkt. No. 62. On October 5, 2011, Plaintiff filed her FAC alleging violations of the ADA, the DPA, and the Unruh Act. Dkt. No. 63. Defendant moved to dismiss Plaintiff's FAC on October 19, 2011. Dkt. No. 66. This court granted Defendant's motion, dismissing all of Plaintiff's claims. Dkt. No. 76. The ADA and DPA claims were dismissed with prejudice because Plaintiff's complaint exceeded the scope of Judge Fogel's Order with respect to these claims. In regards to the Unruh

Act claim, this court found that “[Plaintiff]’s] allegations describe a facially neutral verification process with a disparate impact on the deaf community, but they do not demonstrate intentional discrimination. Furthermore, the fact that [Plaintiff] contacted eBay’s customer service and unsuccessfully requested to have eBay’s otherwise applicable procedures modified is not sufficient to state a plausible claim of intentional discrimination.” Having highlighted the flaws in Plaintiff’s Unruh Act claim, this court dismissed it with leave to amend.

Plaintiff filed her SAC on September 6, 2012, leaving her ADA and DPA claims “to preserve a potential appeal,” and modifying her Unruh Act claim. Dkt. No. 77. Defendant filed its Motion to Dismiss the SAC on September 20, 2012. Dkt. No. 80. The court now turns to this motion.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim in the complaint with sufficient specificity to “give the defendant fair notice of what the ... claim is and the grounds upon which it rests.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations omitted). A complaint which falls short of the Rule 8(a) standard may be dismissed if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim is “proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory.” Shroyer v. New Cingular Wireless Servs., Inc., 606 F.3d 658, 664 (9th Cir. 2010) (quoting Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)). In considering whether the complaint is sufficient to state a claim, the court must accept as true all of the factual allegations contained in the complaint. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). While a complaint need not contain detailed factual allegations, it “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Id. (quoting Twombly, 550 U.S. at 570).

III. DISCUSSION

Because the court previously dismissed Plaintiff's ADA and DPA claims with prejudice, the Unruh Act claim is the only remaining cause of action susceptible to dismissal. The Unruh Act provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their ... disability ... are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code § 51(b). To maintain an Unruh Act claim independent of an ADA claim, Plaintiff must allege "intentional discrimination in public accommodations in violation of terms of the Act." Munson v. Del Taco, Inc., 46 Cal.4th 661, 668 (2009) (quoting Harris v. Capital Growth Investors XIV, 52 Cal. 3d 1142, 1175 (1991)). To state a claim for intentional discrimination Plaintiff must allege "willful, affirmative misconduct," which constitutes more than a disparate impact of a facially neutral policy on a particular group. Koebke v. Bernardo Heights Country Club, 36 Cal.4th 824, 854 (2005).

In her SAC, Plaintiff removes certain allegations contained in her FAC that this court found offset her intentional discrimination claim. In their place Plaintiff includes new allegations regarding an in-person meeting she had with eBay's counsel after the filing of this lawsuit. Particularly, Plaintiff now alleges that after that meeting, in which surely her identity was verified, Defendant "still refuses to allow Plaintiff to register as an eBay seller." Dkt. No. 77 ¶ 93. The only "plausible conclusion," according to Plaintiff, is that Defendant "is intentionally discriminating against Plaintiff on account of her disability." Id. Alternatively, Plaintiff suggests that Defendant is "no longer applying its policies to achieve its stated purpose of preventing fraud"—because Defendant has now verified Plaintiff's identity in person, nullifying the possibility of fraud—but rather is applying its policies "to discriminate against Plaintiff." Id.

Defendant contends that Plaintiff's SAC fails to state a claim for intentional discrimination under the Unruh Act because Plaintiff's allegations still only describe a facially neutral policy that has a disparate impact on her. Taking the SAC on its face, this court agrees. That Defendant has failed to register Plaintiff as a seller even after meeting her is not, without more, sufficient to

1 constitute the “willful, affirmative misconduct” required to state a claim of intentional
2 discrimination under the Unruh Act.

3 In dismissing Plaintiff’s Unruh Act claim in her FAC, this court noted that Plaintiff’s
4 complaint lacked facts supporting her potential theories of intentional discrimination. Plaintiff has
5 failed to remedy this deficiency in her SAC. The absence of supporting factual allegations is fatal
6 to Plaintiff’s claim. Particularly, Plaintiff has not alleged that she affirmatively sought to register
7 as a seller after this meeting, nor has she included any allegations that Defendant specifically
8 denied any renewed request she may have made. More importantly, Plaintiff has failed to include
9 any allegations suggesting that Defendant’s refusal or failure to register her as a seller after their
10 meeting was related to her disability. While Plaintiff alleges that her disability is the “only
11 plausible explanation,” the court simply is not persuaded by this conclusory contention. See
12 Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996) (“[C]onclusory allegations of law
13 and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a
14 claim.”); accord Iqbal, 555 U.S. at 677–80. In fact, any number of factors could have contributed
15 to Defendant’s failure to register Plaintiff as a seller.

16 Plaintiff cannot satisfy Rule 8’s requirements by simply alleging that (1) she is deaf, (2) she
17 notified Defendant that its seller verification procedure discriminated against deaf persons, (3)
18 Defendant had the opportunity to verify her identity, but (4) Defendant nevertheless failed to
19 register her as a seller. Rather, she must include some allegation firmly connecting her disability to
20 Defendant’s refusal to register her as a seller. In a similar case in this district, Young v. Facebook,
21 Inc., a plaintiff suffering from bipolar disorder claimed that Facebook had intentionally
22 discriminated against her by terminating her account and addressing her concerns with automated
23 responses instead of with real human interaction, which would have been capable of assisting
24 persons with mental disabilities. Young v. Facebook, Inc., 790 F.Supp.2d 1110, 1116 (N.D. Cal.
25 2011). The court in that case dismissed the plaintiff’s Unruh Act claim, explaining that despite her
26 vivid description of the difficulty she encountered with Facebook’s customer service system as a
27 result of her disability, she had not alleged that Facebook had treated her differently because of her
28

1 disability. Likewise here, without an allegation tying Defendant's failure to register Plaintiff as a
 2 seller to her hearing impairment, Plaintiff has failed to allege that eBay intentionally treated her
 3 differently because of her disability and her claim thus must be dismissed.

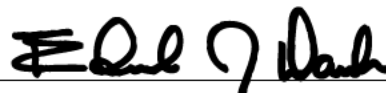
4 Plaintiff has now attempted to plead this claim three times and has received guidance from
 5 both Judge Fogel and this court as to the deficiencies in her claim as pleaded. Because Plaintiff has
 6 still failed to allege the necessary intentional discrimination the court finds any further attempts to
 7 amend would be futile. See Duma v. Kipp, 90 F.3d 386, 393 (9th Cir. 1996) (affirming district
 8 court's dismissal without leave to amend because Plaintiff had filed four complaints "and yet
 9 continued to allege insufficient facts"). Therefore, Plaintiff's Unruh Act claim will be dismissed
 10 with prejudice.

11 **IV. CONCLUSION**

12 For the foregoing reasons, the Court GRANTS Defendant's Motion to Dismiss Second
 13 Amended Complaint with prejudice. Because the remaining causes of action in Plaintiff's
 14 complaint have already been dismissed with prejudice, the complaint is dismissed in its entirety.
 15 Defendant's Motion to Strike is therefore moot. Judgment will be entered in favor of Defendant.
 16 The clerk of the court shall close this file.

17 **IT IS SO ORDERED**

18 Dated: December 20, 2012



EDWARD J. DAVILA
 United States District Judge